IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18/06/2004

CORAM

THE HONOURABLE MR.JUSTICE N.V.BALASUBRAMANIAN
AND
THE HONOURABLE MR.JUSTICE V.KANAGARAJ

APPEAL SUIT No.1476 OF 1988.

Thanjavur Municipality
represented by its Commissioner,
Ghandhiji Road,
Thanjavur. ... Appellant

-Vs-

R.Swaminathan ... Respondent

Appeal Suit preferred under Section 96 of the Code of Civil Procedure
for the relief as stated therein.

!For appellant : Mr.V.Venkatasamy

^For respondent: Mr.N.Maninarayanan

:JUDGMENT
V.KANAGARAJ, J.

The above appeal suit is directed against the judgment and decree dated 26.10.1987 rendered in O.S.No.49 of 1984 by the Court of Subordinate Judge, Thanjavur thereby dismissing the said suit filed by the appellant herein.

2. Tracing the history of the above appeal suit, it comes to be known that the appellant herein has filed the suit in O.S.No.49 of 1984 before the Court of Subordinate Judge, Thanjavur for recovery of a sum of Rs.30,100/= from the respondent/defendant on averments such as that the defendant was the successful bidder of plot No.1 in T.S.No.301 3 in 6 acres 68 cents in the auction held on 25.3.1982; that earlier to this auction, the same plot was put on the open auction on 17.3.19 82 and the defendant was the highest bidder having bidden for Rs.11,8 00/= for the period commencing from 1.4.1982 to 31.3.1983 and since the bid amount was less, it was re-auctioned on 25.3.1982 wherein also the defendant was the higher bidder for a sum of Rs.30,100/= and the said bid was accepted and confirmed by the plaintiff on 27.3.1982 in its Resolution No.1388 and the same has been communicated to the defendant; that

as per the sale condition, the successful bidder has to deposit four months rent in advance and also execute the agreement and even though the defendant was called upon to do so by the communication dated 27.3.1982, he did not do the same.

3. The further case of the plaintiff is that the defendant wrote to the plaintiff by a letter dated 29.3.1982 raising certain allegations, which are untenable; that the auction was held after due publicity and after publishing sale condition to the bidders; that the defendant knowing the Plot No.1 fully well, contested the auction held twice and on both the occasions, he along with other bidders signed the letters to abide by the auction conditions after knowing the sale conditions dated 22.1.1982; that on both the occasions, he also executed a Muchalika to abide by the sale conditions dated 22.1.1982 and therefore, it is improper on the part of the defendant to dispute certain conditions as regards Plot No.1 in T.S.No.3013 which is a grass farm enjoyed by the plaintiff prior to the date of auction for some years; that the grass was in existence and only after knowing the real position, the defendant participated in the bidding and became the highest bidder for a sum of Rs.30,100/=, which he himself did for Rs.11,800/= at the first auction; that for the reason best known to him, he refused to execute the agreement though he took possession of the property in pursuance of the bidding; that in spite of several attempts by the plaintiff, the defendant neither deposited four months' rent nor executed the agreement and therefore the plaintiff was constrained to cancel the licence on 12.10.1982 and informed the defendant, which was acknowledged by the defendant on 18.10.1982; that the plaintiff informed by this notice that the fresh auction would be held at his expenses and that he would be held liable for loss arising thereunder and action would be taken against him under clause 16 of the sale conditions; that even though the fresh auction was held after due publicity on 22.12.1982, there was no bid and again another date was fixed for auction on 24.1.1982; that since there was no bid, tender was called for on 10.2.1983; that since there was no response and as the year was nearing end, further auction could not be conducted and the defendant is therefore responsible for the loss caused to the plaintiff by his non-performance and failure to abide by the sale conditions and therefore the defendant is liable for the loss of Rs.30,100/=.

4. The defendant would file the written statement thereby denying all the allegations of the plaint and further submitting that in the urgent notice dated 4.4.1982, the plaintiff has not mentioned about the existence of grass in spite of this defendant's letter dated 29.3.19 82 enclosing a photograph of the property and mentioning that the land is only barren with no grass on it; that the plaintiff in the above notice has stated that the defendant has taken the auction of the property only in "as is where is" condition; that the plaintiff has also stated that steps are being taken to repair the electric motor and also to demarcate the property with the help of the surveyor and this notice is sufficient to disprove the contention of the plaintiff that there was grass or that the possession was taken by the defendant.

5. The defendant would further submit that even though the plaintiff has contended that their attempts to re-auction the property did not

materialise, it is submitted that the plaintiff has not chosen to demarcate the land nor raise grass, nor set right the electric motor even at the time of the expiry of the auction period of 1982-83; that the auction contemplates guinea grass and its existence suggesting as though the successful bidder could begin to cut and sell the grass even from 1.4.1982; that inasmuch as grass had to be raised only subsequently by the plaintiff means that the lessee could not have the benefits for another 3 to 4 months until the grass is ready for the first cutting; that the allegation in the plaint that there was no response for the subsequent auction dated 22.12.1982 and 24.1.1983 and that there was no bid for the tender called for on 10.2.1983 would clearly prove that what the plaintiff wanted to advertise viz. grass pannai was not there and that the plaintiff attempted to have an unjust enrichment; that clause 16 of the General Conditions is invalid being oppressive, unjust and one sided; that even otherwise, the said Clause 1 6 cannot be invoked inasmuch as the plaintiff has chosen to auction out the right to cut the grass which is not in existence; that even if the possession of the land is taken, there was no possibility of the lessee to harvest the grass until after the expiry of 3 to 4 months when the grass to be planted would be ready for harvest.

6. The defendant would further submit that the plaintiff cannot seek to recover the entire sum for non-performance; that this defendant does not admit that genuine steps were taken to put up the grass in auction either prior to 1.4.1982 or after the confirmation or even after the cancellation of the lease in favour of this defendant; that even assuming that steps were taken earnestly for fresh lease which failed, nothing prevented the plaintiff to cut the grass and sell the same; that after all, the plaintiff, according to its own contention was engaging its own labour and selling the grass for some years previously; that if the plaintiff's contention that there were grass on the farm is true, then the silence and apathy of the plaintiff would mean that it has allowed the grass to get wasted; that the loss, if any, is

more due to the default of the plaintiff, who did not perform its part of the contract and the non-performance on the part of the plaintiff, made this defendant unable to perform his part of contract.

7. The defendant would further submit that under law, the plaintiff cannot be allowed to seek recovery of the sum for which this defendant bade; that the plaintiff has to show loss specifically and accurately before it can call upon the defendant to pay any sum; that nowhere in the plaint, it is stated how the loss of Rs.30,100/= was arrived at; that the loss cannot be equated to the bid of this defendant and the circumstances in this case, clearly go to show that the loss claimed cannot be true and admittedly, this defendant, for the same period, bade at Rs.11,800/= which the plaintiff did not accept; that admittedly the subsequent auctions on 22.12.1982 and on 24.1.1983, the tender fixed for 10.2.1983 did not have response.

8. The defendant would further submit that as stated already, the plaintiff itself has not chosen to safeguard its own crops which according to the plaintiff existed; that the loss claimed is imaginary; that there was no concluded contract; that it is not the intention of the parties to enter into the required contract until the plaintiff fulfils its part of the contract and

hence this defendant has not executed any agreement; that this defendant has got every right to rescind with the contract pointing out the fact that he has been misled and the plaintiff has chosen to defraud; that this defendant has also not been put in possession as the property was not demarcated; that the suit is misconceived; that the plaintiff has no right to forfeit the advance amount of Rs.1,000/= and the plaintiff is bound to return the same.

9. A reply statement would be filed by the plaintiff thereby submitting that the defendant is not entitled to get back the caution deposit paid in advance; that the defendant was fully aware of the sale condition and the properties brought for auction; that clause 16 in the general conditions is quite reasonable and is intended to safeguard the rights and liabilities of both parties; that the defendant who bade in the first auction had bidden for more amount on the second occasion soon after, only because he knew the auction property and its condition fully well; that the contract is a concluded contract and the defendant had executed a Muchalika to comply with the sale conditions; that because of the failure to perform his part of the contract, the plaintiff, a public institution, is put to heavy loss which is to be compensated by the defendant; that moreover, the plaintiff has filed the suit for recovery of damages; that the caution deposit can be returned only if there is no audit objection subject to conditions in clause 23 of the sale conditions; that the plaintiff is entitled to forfeit the caution deposit in this case, as per clause 16 of the sale condition and therefore there is no question of the caution deposit being repaid to the defendant and the defendant's claim for Rs.1,000/= to be rejected with costs.

10. Based on the above pleadings, the Court below would frame the following issues:

1.Whether the plaintiff is entitled for recovery of Rs.30,100/=?
2.Whether the contract between the plaintiff and the defendant is a concluded one?
3.Whether the plaintiff is bound to return the caution deposit of Rs.1,000/= to the defendant?
4.To what relief, if any, the plaintiff is entitled?

11. Thereupon, the Court below would conduct the trial wherein on behalf of the plaintiff, two witnesses would be examined for oral evidence as P.Ws.1 and 2 and would mark 13 documents for documentary evidence as Exs.A.1 to A.13 and on behalf of the defendant, besides examining himself as D.W.1, he would also examine one Kuppusamy as D.W.2 for oral evidence and would mark seven documents as Exs.B.1 to B.7 for documentary evidence.

12. In consideration of the above said oral and documentary evidence in its own way, the trial Court would dismiss the suit further rejecting the plea of the defendant for return of the caution deposit. Aggrieved, the plaintiff therein has come forward to prefer the above Appeal Suit on certain grounds as brought forth in the grounds of appeal.

13. During arguments, the learned counsel appearing on behalf of the appellant and the respondent as well would only reiterate what they have respectively projected before the trial Court, which are placed on record, without any new fact or circumstance being brought forth or law pleaded pertaining to the subject in hand and therefore, tracing the arguments of the learned counsel would only be a repetition of what has already been traced herebefore and hence, this Court is inclined to pass its judgment based on the facts and circumstances pleaded by parties before the trial Court, the issues framed therein, the evidence placed on record and the appreciation of the same, of course, in full consideration of the legality pertaining to the subject, which is more important in cases of such nature than even the facts pleaded and circumstances brought forth.

14. The prayer of the appellant before the trial Court is to pass a decree for a sum of Rs.30,100/= directing the defendant to pay the same with costs of the plaintiff on averments that the respondent/ defendant having agreed to the norms and general conditions, had participated in the auction held on 25.3.1982 to cut the grass in plot No.1 in T.S.No.3013 in a land measuring 6.68 acres; that since the said right was put on open auction on 17.3.1982 and since the target was not achieved, it was re-auctioned on 25.3.1982 for the period commencing from 1.4.1982 to 31.3.1983 wherein the defendant became the successful bidder for a sum of Rs.30,100/= and the same having come to be accepted and confirmed by the appellant on 27.3.1982 as per its resolution No.1388; that as per the sale condition, the successful bidder has to deposit four months' rent in advance and to execute the agreement, but the respondent in spite of being the successful bidder and in spite of a communication sent on 27.3.1982 did not comply with the conditions of the auction sale and hence the said right of cutting the grass from the said land had to be brought to re-auction and that as per the auction conditions agreed by the respondent/defendant he is responsible for the loss caused to the appellant/plaintiff by his nonperformance and failure to abide by the sale conditions and hence the suit for the recovery of the said sum with costs.

15. On the other hand, on the part of the respondent/defendant, it would be argued that the appellant/plaintiff had not mentioned about the existence of the grass and that the land was only barren with no grass on it; that the auction contemplates guiny grass and its existence and since there was no grass, the lessee could not have the benefit for another three to four months and thus the plaintiff attempted to have an unjust enrichment; that the conditions are invalid since being oppressive, unjust and one-sided; that clause 16 cannot be invoked in the circumstances of the case; that there was no concluded contract and hence on such grounds, pleading that the defendant was not liable to pay the said amount claimed nor is the plaintiff entitled to the same, the defendant would pray to dismiss the suit with costs.

16. The trial Court, having framed its own issues, as extracted supra, and having permitted parties to record evidence, adhering to those issues based on the pleadings and in appreciation of the said evidence placed on record, has ultimately arrived at the conclusion to dismiss the suit and it is only against the said judgment and decree passed by the trial Court, the Court of Subordinate Judge, Thanjavur on 2 6.10.1987, the unsuccessful

plaintiff before the trial Court has come forward to prefer the above appeal suit on certain grounds as pleaded on the part of the appellant.

17. In consideration of the facts pleaded, having regard to the materials placed on record and upon hearing the learned counsel for both, the points that could be framed for determination of the above appeal suit are:
1. Whether the participation in the auction held was in accordance with the

free will of parties, particularly the respondent/defendant, or had there been any compulsion or undue influence wielded on the part of the appellant/plaintiff?

2. Whether the defendant participated in the auction bidding in acceptance of the general conditions of auction or had anything been concealed from his knowledge by fraud or cheating?

3. Whether in the scheme of auctioning the subject matter, the defendant is entitled to withdraw from complying with the conditions of auction as he has admittedly acted and whether he could plead that there has been no concluded contract?

4. Whether the lower Court is right in dismissing the suit filed by the appellant? and
5. What relief, if any, is the appellant entitled to in the above appeal suit?

18. In consideration of the facts pleaded, having regard to the materials placed on record and upon hearing the learned counsel for both, particularly adhering to the legal points framed in the preceding paragraph and in consideration of the issues framed by the trial Court, what could be assessed by this Court is that the appellant herein, which is the Thanjavur Municipality, has filed the suit in O.S.No.49 of 1984 before the trial Court for the recovery of the sum of Rs.30,10 0/= from the respondent/defendant on account of the loss suffered by the plaintiff Municipality on failure of the defendant in complying with the auction conditions found in Ex.A.1 dated 22.1.1982 and having agreed to abide by all the pre-conditions imposed therein and having participated in the auction bidding and having paid the earnest deposit amount of Rs.1,000/= as per Ex.A.2 dated 17.3.1982 and further having participated in the actual bidding of the right to reap the grass for the period from 1.4.1982 to 31.3.1982 as per the auction held on 25.3.1982 and having become the successful bidder for a sum of Rs.3 0,100/= which came to be confirmed on 27.3.1982 as it could be seen from the other Exs.A3 to A.13, the defendant has not complied with the conditions of auction in effecting the bid amount, which gave way for a re-auction to be held in which the plaintiff/Municipality not only incurred loss but also expenses for conducting the re-auction and hence the suit has been filed for the recovery of the said loss amount of Rs.30,100/= from the respondent/defendant and for costs.

19. On the part of the respondent/defendant, he would come forward to put up the argument to the effect that there had been no grass as it had been

advertised by the plaintiff Municipality; that for confirmation of auction and handing over of the spot for operation of the grass cutting, there had been undue delay and that there had been no concluded contract in between the plaintiff and defendant and hence he is not liable to pay the said sum to the plaintiff besides praying for a direction to return the caution deposit amount of Rs.1,000/= paid on his part.

20. On these facts and circumstances, the trial Court has framed four issues, as it could be seen in para No.10 supra, and based on those issues, has allowed parties to record evidence and having appreciated the same, the lower Court has arrived at the conclusion to hold that factually there had been many inconsistencies in the auction conditions and the actual position on ground particularly since there had been no grass found but only the barren land as it came to be argued on the part of the defendant on a spot visit made at a later point of time to the auction and that there had been no concluded contract in between parties since before the confirmation of sale, the defendant had issued notice rescinding with the contract and therefore on such grounds the lower Court has arrived at the conclusion to dismiss the suit as a result of which, aggrieved, the plaintiff/Municipality has come forward to prefer the above appeal suit on grounds as pleaded in the grounds of appeal. This Court having heard both the learned counsel and having assessed the stand points of both, based on the pleadings and the evidence and the judgment rendered by the lower Court, particularly on issues framed by the lower Court, a decision has to be arrived at and at the outset, it must be mentioned that the points framed in Paragraph No.17 supra, which are quite legal, should have been determined and answered by the trial court prior to even entering into the merits on facts, particularly in the light of the issues framed by the lower Court and therefore, it has become incumbent or necessary for this Court to answer those points framed above which are basic to decide a case of this nature.

POINTS No.1 & 2:

21. So far as the point No.1 is concerned, since absolutely there was no complaint on the part of the respondent/defendant to the effect that his participation in the auction held was not in accordance with his free Will and there is no hue or cry on the part of the defendant in his entire pleading that he had either been compelled in any manner or even been instigated or influenced by the plaintiff towards his participation and therefore easy conclusions could be drawn to the effect that the defendant's participation in the auction held on 25 .3.1982 was at his free Will and consent and not under any compulsion or alien influence wielded by anyone much less by the plaintiff.

22. While such being the state of affairs encircling the defendant' s bidding in the auction held for the right of grass cutting for the particular period mentioned above, the second point, whether the defendant's participation in the auction bidding was in acceptance of the auction conditions imposed in Ex.A.1 auction notice needs to be answered in the affirmative since as per Ex.A.2, the defendant had volunteered to pay the caution deposit of Rs.1,000/= so as to participate in the auction and for the question whether anything had been concealed from the defendant, it is open to

answer that it is up to the defendant to have inspected the locality and become satisfied so as to partake in the auction held by the plaintiff and without doing so, abiding by the conditions of auction, the defendant having participated in the auction and having become the successful bidder, has no reason to retreat or loiter about lamenting to the effect that he had been under the impression that there would be enough grass and that the field would be handed over immediately thereafter etc. Therefore, since the defendant was at liberty either to partake or to refrain from participating in the auction bidding, there is no question of lamenting later pointing out certain defects which he should have ascertained prior to participating in the auction bidding and once the defendant agrees the auction conditions and participates in the auction particularly becoming the successful bidder, there is no question of his going back unless he challenges any of the clauses imposed therein. The defendant has no right to retreat on any score as such right has not been given to him as per the terms and conditions of auction.

23. While such being the legal position, unless the defendant takes up the plea that there was fraud or cheating perpetrated on the part of the plaintiff either to malign him or to boost any other auction participant, no other defence could be put up on his part to rescind with the commitments made or the contract entered into and once the bidding is over, the right solely vests with the plaintiff either to confirm the auction within a reasonable time or to cancel the same for which the plaintiff is permitted under the clauses of Ex.A.1 and therefore the defendant is not permitted to go beyond his commitment as per Ex.A.1.

POINT No.3:

24. Coming to the next and vital point pertaining to the withdrawal of the defendant from compliance of the requirements in making payment of the balance money and to carry on with the subject matter of auction purchase in the manner provided for, particularly whether the defendant could raise the plea that there had been no concluded contract as per the provisions of the Indian Contract Act, the answer, in a nutshell, is a big 'NO'.

25. First of all, it has to be ascertained that the auction was not held and the defendant's participation was not made in accordance with the provisions of the Contract Act but purely in accordance with the general provisions of law embodied in Ex.A.1 auction notice and any violation of those provisions would only give cause of action for a party to seek protection legally and unless it is provided for therein, the defendant has no other defence but to comply with the preconditions imposed under Ex.A.1 in total agreement of which the defendant volunteered to participate in the public auction held on payment of the caution deposit and agreeing to the terms and conditions of auction and there is absolutely no right of any kind given to the defendant either to withdraw himself from the other proceedings towards implementing the auction purchase or to take up the plea that there had been no concluded contract since it was a free and voluntary participation made by the defendant in obedience to the terms and conditions stipulated in Ex.A.1 auction notice. If at all any defect could be found either in handing over the subject matter or for non-cooperation on the part of the plaintiff and if any loss is sustained on account of non-compliance of the declared norms by

the plaintiff, the only course open for the defendant is to file a damage suit and he cannot withdraw from complying with the conditions of auction for which nothing is provided for under Ex.A.1. Therefore, if at all the defendant, under any score, withdraws or refrains from complying with the requirements towards fructifying the auction purchase, it could be done only at his risk and loss and nothing else.

26. It is relevant, at this juncture, to have a little discussion on the second issue framed by the trial Court to the effect 'whether there had been a concluded contract in between the plaintiff and the defendant'. This question would arise when there is a definite contract entered into in between parties on an agreement entered into on certain terms and conditions and the non-compliance of which by either of the parties would pave the way for such a question to be raised. But, in the case in hand, though the contractual liability would appear to have been involved, still, it is purely the auction purchase of the right to cut the grass in a particular field for a particular period, in compliance with the conditions imposed therein agreeing which the defendant ventured to enter into the fray on payment of the caution deposit and for the bidding in the auction so as to become the successful bidder.

27. All these acts perpetrated on the part of the defendant being not under any compulsion by anyone much less by the plaintiff and purely voluntary in nature, the defendant is not permitted either to go back or to withdraw from his commitment and in law the defendant is estopped from doing so. In short, the act of withdrawal or noncompliance of the rest of the requirements towards fructification of the auction sale by the defendant is absolutely bereft of any legal backing and the same cannot be approved in law. Therefore, the third point should also be decided only against the respondent/defendant.

POINT No.4:

28. It could be summarised that the auction had been held by the plaintiff/Municipality in the public interest and it was a free and fair one and whether to confirm the auction or cancel the same is purely at the Will and pleasure of the authorities of the plaintiff and the same is not within the purview of the defendant who has become the successful bidder and his only business is to wait for the confirmation and to pay the rest of the auction amount as prescribed in the terms of auction. The conditions imposed, since being free contract terms, they cannot be subsequently either withdrawn or rescinded with. The defendant having volunteered to participate the auction bidding in full agreement of the conditions of auction purchase and having become the successful bidder, any non-compliance of the terms of the auction purchase, would only pave the way for the plaintiff to claim the damages and it has been rightly claimed on the part of the plaintiff by the above suit. Therefore, neither the lower Court is justified in framing the second issue and getting an answer to the effect that there has been no concluded contract, which point could not be raised on the part of the defendant nor the same could be taken up for consideration and answered in the manner done by the lower Court, since in the case in hand, the contract becomes concluded the moment parties become the successful bidders in the auction held and therefore on the part of the lower court, the conclusions arrived at are absolutely

bereft of any legality since the defendant is estopped from claiming such rights and therefore the fourth point could only be answered against the respondent/defendant making it clear that the lower Court is not right in dismissing the suit filed by the appellant. But, on the contrary, in compliance of the legality involved, the lower Court should have decreed the suit as prayed for and in result for the fifth point framed, it has to be decided that the appellant is fully entitled to get a decree as prayed for and hence the following judgment:

POINT No.5:
In result,
(i) the above appeal suit succeeds and the same is allowed with costs throughout.
(ii)The judgment and decree dated 26.10.1987 rendered in O.S.No.49 of 1984 by the Court of Subordinate Judge, Thanjavur is hereby set aside.

(iii) The suit in O.S.No.49 of 1984 on the file of the Court of Subordinate Judge, Thanjavur stands decreed as prayed for.

Index: Yes
Internet: Yes

Rao

To
The Subordinate Judge,
Thanjavur.

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